

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
SUPPLEMENTAL
APPENDIX**

76-6151

United States Court of Appeals

FOR THE SECOND CIRCUIT

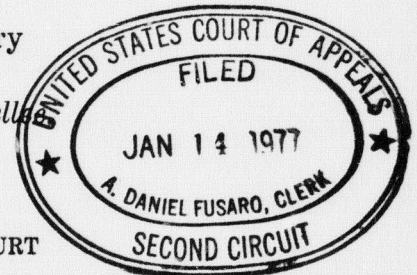
Docket No. 76-6151

CHARLES R. HARARY,
Plaintiff-Appellant,

—v.—

WILLIAM E. SIMON, Secretary of the Treasury
of the United States of America,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



SUPPLEMENTAL APPENDIX FOR DEFENDANT-APPELLEE

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Defendant-Appellee.*

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

300 U.S. DISTRICT COURT
FILED 9-24-75
S.D. of NEW YORK

----- x
CHARLES R. HARARY,

Plaintiff,

-v-

WILLIAM E. SIMON,
Secretary of the Treasury,

Defendant.
----- x

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:
:
: LIST OF EXHIBITS

: 74 Civ. 5712 (TPG)
:
:

The defendant, William E. Simon, Secretary of the Treasury, by his attorney, Paul J. Curran, United States Attorney for the Southern District of New York, hereby files the following exhibits to the motions for summary judgment which will follow:

Exhibit A - Transcript of administrative hearing in Acting Director of Practice v. Charles R. Harary, Complaint No. 72-6, held on October 4, 1973.

Exhibit B - Complaint in Acting Director of Practice v. Charles R. Harary, Complaint No. 72-6 (Government's Exhibit 1 at administrative hearing of October 4, 1973).

Exhibit C - Answer to complaint in Acting Director of Practice v. Charles R. Harary, Complaint No. 72-6 (Government's Exhibit 2 at administrative hearing of October 4, 1973).

Exhibit D - Transcript of trial in United States of America v. Charles R. Harary, et al. 70 Cr. 1104 (CM) (Government's Exhibit 3 at administrative hearing of October 4, 1973).

Exhibit E - Indictment in United States of America v. Charles R. Harary, et al., 70 Cr. 1104 (CM) (Respondent's Exhibit 1 at administrative hearing of October 4, 1973).

Exhibit F - Opinion of the United States Court of Appeals for the Second Circuit in United States of America v. Charles R. Harary, Docket No. 71-1933 (Respondent's Exhibit 2 at administrative hearing of

October 4, 1973.)

Exhibit G - Initial Decision of Administrative Law

Judge Ralston in Director of Practice v. Charles R. Harary, Complaint No. 72-6.

Exhibit H - Decision on Appeal in Director of Practice v.

Charles R. Harary, Complaint No. 72-6.

Respectfully submitted,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for Defendant

By:

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A 302

THE DEPARTMENT OF THE TREASURY
OFFICE OF THE DIRECTOR OF PRACTICE
WASHINGTON, D. C.

-----X
ACTING DIRECTOR OF PRACTICE, :
Complainant, :
-against- : Complaint No. 72-6
CHARLES R. HARARY :
Respondent :
-----X

120 Church Street, Rm. 1911-D
New York, New York 10008

October 4, 1973
10:50 O'clock A.M.

BEFORE:

LEONARD J. RALSTON,
Hearing Examiner,
Internal Revenue Service.

A

Complaint No. 72-6

A P P E A R A N C E S:

KENNETH N. HOLLAND, Esq.,
Attorney for Director of Practice,
Office of Chief Counsel,
1111 Constitution Avenue N. W.,
Washington, D. C. 20224

MICHAEL FAWER, Esq.,
Attorney for Respondent,
Office of KULLMAN, LANG, INMAN & BEE
615 Howard Avenue
New Orleans, Louisiana

CHARLES R. HARARY
Respondent.

Complaint No. 72-3

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William Windhear

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THE HEARING EXAMINER: Gentlemen, this proceeding will come to order. This case is before the Department of Treasury and has been instituted by the Director of Practice Vs. CHARLES R. HARARY, Respondent; Identified as Complaint No. 72-6.

Pursuant to the regulations of the Department, I will swear the reporter in.

(Whereupon, BETTY E. MINA, Reporting Stenographer, was duly sworn by the Hearing Examiner to record the proceedings to the best of her ability.)

THE HEARING EXAMINER: Will the representatives of the parties identify themselves for the record.

MR. HOLLAND: Kenneth N. Holland, Attorney for the Director of Practice.

MR. FAWER: Mr. Charles R. Harary, Respondent, is represented by Michael S. Fawer.

THE HEARING EXAMINER: I would like for the record to reflect that Mr. Harary is present at this hearing.

Gentlemen, as I understand, maybe we should follow the regular procedure. Mr. Holland, you want to put the pleadings on the record?

MR. HOLLAND: Yes. I would like to have marked as Government Exhibit Number I the Complaint, No. 72-6, Acting Director of Practice Vs. Charles R. Harary, Respondent.

THE HEARING EXAMINER: Any objections?

MR. FAWER: No objections.

MR. HOLLAND: I would like to have marked as Government Exhibit Number II the Answer in this proceeding.

BEST COPY AVAILABLE

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THE HEARING EXAMINER: This is dated December 27, 1972, signed by Mr. Fawer, correct?

MR. FAWER: Correct.

THE HEARING EXAMINER: Mr. Fawer, any objection?

MR. FAWER: None, your Honor.

THE HEARING EXAMINER: All right, be seated. Gentlemen, before we begin the proceedings is there any area of agreement as to any of the allegations that are contained in the Complaint? In other words, are there any grounds, Mr. Fawer, for admissions with respect to any of the allegations that are contained in the Complaint?

MR. FAWER: Your Honor, the only admission that we are willing to enter into at this time, in addition to any admission which we have made in the Pleading, marked Government Exhibit II, is that with respect to Count Four (IV) of the Complaint, we are prepared to admit that on September 22, 1970, Respondent orally represented to MEYER and ABRAHAM SUTTON, S-U-T-T-O-N, owners of SUTTON&SUTTON, LTD. that Internal Revenue Agent Lawrence Ostrow, O-S-T-R-O-W, had agreed to accept \$2,000.

THE HEARING EXAMINER: I think I had better state for the record, as you gentlemen, Mr. Holland and Mr. Fawer, know; we began this proceeding using another reporter and it became evident that the young lady could not take the proceeding; we have therefore begun the

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new from the beginning with the reporter who is now reporting
it is my suggestion, gentlemen, that we treat this record
and only record of the case. Are you both in agreement with

HOLLAND: I am in agreement.

SEVER: I am also.

HEARING EXAMINER: Now, if there is anything that you have stated
before we started making this record and you want to put it in
it, you of course are free to do this; now, what I am trying
this time is: First, find where there are areas in the Pleadings
which require proof; at this point, as I understand from what you stated,
Count Number One (I) is admitted totally and Count Number Four (IV)
to the extent that you just stated and naturally is contained in
it.

SEVER: Correct, your Honor.

HEARING EXAMINER: Do either of you have anything further, with
reference to the issues that are involved as a result of the Pleadings and the
evidence?

SEVER: That is not my burden.

HEARING EXAMINER: You have nothing further?

SEVER: I do, your Honor, but since the burden is upon the Director
to go forward with regard to proof, I would suggest Mr. Holland
offer any proof he wishes to offer.

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THE HEARING EXAMINER: I wasn't calling for proof at this time, I want to make sure there are no further questions between you or from either of you as to what the issues are in this proceeding for proof.

MR. HOLLAND: I have nothing.

THE HEARING EXAMINER: In other words, we have exhausted agreements as far as making allegations are concerned.

MR. FAWER: Yes, your Honor.

THE HEARING EXAMINER: I have a question to ask you, Mr. Holland; this stems from the fact that, as you both know, Mr. Fawer filed a motion in this proceeding to dismiss, based on various reasons contained in the case, and you filed an answer, Mr. Holland.

MR. HOLLAND: That is correct, and you denied this motion.

THE HEARING EXAMINER: I denied that motion; nevertheless, as you both know, I obtained information by virtue of your various statements and representations in your respective briefs in that. What is your position, Mr. Holland, as to the question of Entrapment, E-N-T-R-A-P-M-E-N-T AS A DEFENSE? I am asking a general question in administrative proceedings.

MR. HOLLAND: We do not admit that Entrapment is a defense in a proceeding of this type; furthermore, we deny that Entrapment occurred in the instant matter.

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THE HEARING EXAMINER: I did not even know that point; I want to know whether or not you recognize entrapment as a defense; I think it is 10.51 of the regulations.

MR. HOLLAND: No, we do not recognize it as such.

THE HEARING EXAMINER: Why?

MR. HOLLAND: There have been cases including one in the District Court which have held that entrapment is not a defense in a Civil Administrative Proceeding; now, there is authority on both cases; we maintain it is the better view that entrapment doesn't lie here by virtue of the nature of the proceeding; when somebody is found to have been entrapped, it does not mean he is innocent; his conduct may be disreputable.

THE HEARING EXAMINER: That is your total statement?

MR. HOLLAND: I would like to make it clear, we are not standing on that--I am not standing on that ground alone; we are not standing on that ground alone. We intend to dispute the question as to whether entrapment occurred.

THE HEARING EXAMINER: Do you have any preliminary statements, Mr. Faver?

MR. FAVER: I assume your question goes to the same point you raised with Mr. Holland; I may point out, Number 1, Mr. Holland never even raised this point in answer to my motion; he never touched on the issue.

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THE HEARING EXAMINER: That is not my question.

MR. FAWER: My point is, what Mr. Holland stated, in our view, is the most outrageous Governmental position that could be taken; in other words, the position here espoused by the Government is that even if HARARY was wilfully entrapped by an agent of the Department of the Treasury, the Department of the Treasury has a right to turn around and say, "forget the entrapment, you gave into it, therefore your conduct is disreputable and we can disbar you." That is sheer and utter nonsense under every doctrine the Supreme Court has stated about the Defense of Entrapment. Point Number 2 is that we contend that aside from all the other legal issues we have raised, that the defense of entrapment is fully applicable in this proceeding under whatever means you characterize this proceeding, whether you characterize it as criminal, penal, remedial, civil, administrative, regardless of how you characterize it the defense of entrapment is absolutely and completely a defense to the proceeding.

THE HEARING EXAMINER: Do you want to proceed, Mr. Holland?

MR. HOLLAND: Yes, I would like to have marked as Government Exhibit 3 a copy of the transcript in 70 Cr. 1104, United States of America Vs. Charles R. Harary, Defendant. The purpose of the entry of this Exhibit is that Counsel for Respondent and Counsel for the Director of Practice agree that the evidence as shown in this transcript

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(Continued)

which I am attempting to enter here as Government Exhibit 3 would tend to show offenses.

THE HEARING EXAMINER: What do you mean?

MR. HOLLAND: Would tend to show the offenses charged in the instant proceeding.

THE HEARING EXAMINER: In counts--

MR. HOLLAND: In counts II, III, and IV. In other words, the evidence as reflected in this transcript will show the offenses involved; we do not necessarily enter it for purposes of indicating that the offenses--

THE HEARING EXAMINER: Wait a minute; what you are offering now, as I understand, is evidence in proof of the counts II, III, and IV in the Complaint, correct?

MR. HOLLAND: Yes.

THE HEARING EXAMINER: I don't want to know what you are offering it for; is the total record being offered for that purpose? Do I have to read that total record? Is that what is intended? I am asking the question.

(OFF RECORD DISCUSSION)

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MR. HOLLAND: Your Honor, Respondent's attorney and myself are in agreement that we are willing to put in the entire transcript as evidence of what occurred herein.

THE HEARING EXAMINER: What was that case?

MR. HOLLAND: 70 Cr. 1104, United States of America Vs. Charles R. Harary, Defendant, Dated June 1, 1971.

THE HEARING EXAMINER: Was all the testimony in that case taken under oath?

MR. HOLLAND: Yes, it was.

THE HEARING EXAMINER: Who were the parties?

MR. HOLLAND: The parties were the United States of America and CHARLES R. HARARY.

THE HEARING EXAMINER: What was the nature of the case?

MR. HOLLAND: A criminal prosecution against MR. HARARY, based on three counts. 1, first count, a conspiracy along with ABRAHAM & MEYER SUTTON, to bribe Internal Revenue Agent Lawrence Ostrow. The second count, the charge of bribery against MR. HARARY of Internal Revenue Agent Ostrow and the third count was the giving, what amounts to a gratuity to Internal Revenue Agent Ostrow.

THE HEARING EXAMINER: Is it your position that the issues in that case are identical as the issues in this case?

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MR. HOLLAND: No, that is not entirely the Government position. The Government position is that the facts that would be introduced here are identical.

THE HEARING EXAMINER: Are you saying that the statements that are made there by all the parties I am to accept; I am to accept this truth because this was a trial, as I understand it, and in that trial evidence is given and that evidence is true or not true, depending on the verdict of the jury or the finding of the Court; are you telling me that I take the finding of the Court or verdict of the jury, or that I take as true all the statements of all the parties that are set forth in this transcript?

MR. HOLLAND: I am suggesting--

THE HEARING EXAMINER: I don't want a suggestion, I want a statement.

MR. HOLLAND: The Government is saying that you take the testimony that was made in the criminal proceedings as being the testimony that is being made here; it is for your evaluation; you don't have to accept the statements.

THE HEARING EXAMINER: Who were the witnesses that are involved, whose testimony you are asking me to take in this case?

MR. HOLLAND: I am asking you to take the testimony of Internal Revenue Agent Lawrence Ostrow and the testimony of Inspector Harold Wenig.

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THE HEARING EXAMINER: Anyone else?

MR. HOLLAND: No other witnesses, no.

THE HEARING EXAMINER: It is their testimony that you are offering as contained in that record, correct?

MR. HOLLAND: That is correct, sir.

THE HEARING EXAMINER: Were they cross-examined?

MR. HOLLAND: Yes, these witnesses were cross-examined.

THE HEARING EXAMINER: This being part of their testimony, correct?

MR. HOLLAND: That is correct.

THE HEARING EXAMINER: You realize, both of you, that I don't have the benefit, if I should accept this, of the presence of those witnesses in this proceeding?

MR. HOLLAND: I recognize that fact, your Honor.

THE HEARING EXAMINER: Mr. Faver, do you recognize that?

MR. FAVER: Yes.

THE HEARING EXAMINER: I will give you an opportunity to make comment here, Mr. Faver. You say they were testifying, if I understand, as to the issues in that case? Where are the issues identified in that case?

MR. HOLLAND: The issues would run throughout the testimony of the witnesses.

THE HEARING EXAMINER: Are the issues the same as the issues in this case?

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MR. HOLLAND: Not exactly.

THE HEARING EXAMINER: Tell me the difference.

MR. HOLLAND: For example, the respondent is charged here in this proceeding.--

THE HEARING EXAMINER: In the one we are dealing with now? In this Administrative Proceeding?

MR. HOLLAND: With a violation of Section 10.22(c), which was not a charge or an issue, per se, before the Court, although there was discussion.

THE HEARING EXAMINER: Before the Court in the Criminal Case?

MR. HOLLAND: Correct. Also on Count Number I of the Indictment in the Criminal Case, 70 Cr. 1104, Respondent was charged with Conspiracy; Respondent is not directly charged with conspiracy in this proceeding; that is, the Director of Practice proceeding; he is charged again with a somewhat similar charge of acting in agreement with MEYER & ABRAHAM SUTTON, but this is not a Conspiracy Charge.

THE HEARING EXAMINER: Under what count?

MR. HOLLAND: Count Number III of the present Complaint in the Director of Practice case.

THE HEARING EXAMINER: As I understand, you are indicating that that testimony in the criminal action, both direct and cross-examination, on the Indictment of Conspiracy, is offered as your proof for Count Number III in the Complaint in this case?

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MR. HOLLAND: There may be additional factors in the transcript.

THE HEARING EXAMINER: In what transcript?

MR. HOLLAND: In Government Exhibit 3 for identification, which might bear upon the charge, your Honor, Roman Numeral III.

THE HEARING EXAMINER: I don't know what you mean by that.

MR. HOLLAND: The evidence as it appears in the criminal transcript; we are merely maintaining that the evidence in the criminal transcript will show that the allegations in Roman Numeral III are correct; I can't be any more specific.

THE HEARING EXAMINER: Will you, in the brief that I am going to request from you, as well as Mr. Fawer, be able to refer to specific pages of the testimony here in support of your position?

MR. HOLLAND: Yes, sir, absolutely.

THE HEARING EXAMINER: I can warn both of you now, that that is what I will rely on principally. Is there any question about that?

MR. FAWER: Yes, there is for me; the first point is; there are three defense witnesses to appear at the Criminal Trial not mentioned by Mr. Holland; I assume he was indicating the two witnesses who he is offering on behalf of the Complaint; I would just indicate there were three very brief defense character witnesses: Mr. Lendrihas, Rabbi Shamah and Mr. Greene, whose testimony we of course would offer, as well, at this time.

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THE HEARING EXAMINER: You haven't quite answered my question; I am going to require briefs from both of you.

MR. FAWER: I understand.

THE HEARING EXAMINER: Those briefs will obviously be in support of your respective positions; for instance, Mr. Holland will be pointing-- or should point--to evidence that supports whatever counts he intends to prove in the complaint, and I would expect him to refer specifically to the evidence, pages, witnesses, but pages in particular, in this proposed Exhibit that he offers in support of, for instance, Count Number II; and by the same token to the extent that you are relying to any extent or degree by way of defense with respect to any of your asserted defenses, or you are relying to any degree on this testimony in this criminal trial, I will expect you to refer specifically. Do I make myself clear to both of you?

MR. FAWER: Yes. I would like to add, I will fully comply; my brief will detail every reference that I make to GX-3 for Identification; at this point I would also point out that there will be references in my brief to portions of Exhibit 3 which is not testimony, such as the argument made to the Jury in this case, such as, the charge of the Judge in the case because in both of those items I use them as examples leading to one of my defenses in this case; what I am saying is: I

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not only will detail the evidence in support of our factual defenses, but our legal defenses as well; I will do that to the best of my ability;

THE HEARING EXAMINER: If I understand what you are saying, that you will employ this proposed GX-3 not only for factual evidence of testimony by witnesses, but also for use in connection with legal arguments that you may make in the case. Correct?

MR. FAWER: Exactly.

THE HEARING EXAMINER: Do you have any comment, Mr. Holland?

MR. HOLLAND: I have no objection.

THE HEARING EXAMINER: Obviously, gentlemen, what I am saying here is that I will not purport to read GX-3 until I get your respective briefs. I will decide later whether I may or may not read the total contents of this Exhibit; what I am trying to make clear to you is that I haven't the slightest idea what is contained in this Exhibit, but I am trying to make clear to you how I intend to employ it in support of your respective positions, based on what I assume is in it, which is based upon what you have told me; in other words, I will not, when I get the transcript in this case we are now hearing in the Complaint of the Director of Practice with the Exhibits, when I receive the original transcript, which would include this Exhibit, I will not immediately start to read that Exhibit, because I want to

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get clearly in mind your respective positions. Do I make myself clear as to what I am trying to say here?

MR. HOLLAND: Yes, sir.

THE HEARING EXAMINER: Mr. Fawer, do you have any question?

MR. FAWER: No, sir.

THE HEARING EXAMINER: Do you have any comment or objections to that approach? Do I understand you have no objections?

MR. HOLLAND: No.

THE HEARING EXAMINER: Mr. Fawer?

MR. FAWER: No.

THE HEARING EXAMINER: You are making that offer now, are you?

MR. HOLLAND: Yes.

THE HEARING EXAMINER: How many pages is that?

MR. HOLLAND: Approximately five hundred pages; the transcript is not numbered consecutively; it is not possible to tell you how many pages are involved.

THE HEARING EXAMINER: Has Mr. Fawer examined this proposed Exhibit?

MR. FAWER: The answer, your Honor, is that Mr. Holland and I were in communication in an effort to expedite this proceeding; this transcript is a copy of my copy of the transcript which I have before me now; apparently Mr. Holland had some problem at the Court House

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to locate the official court transcript; this is an accurate copy; the reason you have a portion of it that is not consecutively numbered is that the Court's charge was numbered separately; there are two points here; running through the transcript are certain notations; you see material with a cross, or underlined; as to the matter underlined, it is of no significance; since this was my copy, I used it as I saw fit. Secondly, the reasons for the crosses you can quickly disregard because this copy was used in the preparation; it is what is known as the Blueprint for the preparation of the appendix in the Court of Appeals; you should disregard the cross-out marks; I would make a suggestion--

THE HEARING EXAMINER: --If I understand you correctly, this will show some of the testimony or other contents of this Exhibit stricken out or underscored;; I should ignore this.

MR. PAWER: Yes. I have one suggestion; it would be useful if Mr. Holland--I think this could be done after--does number Exhibit 3 from one through whatever it is so that we then, in referring to the pages, in the course of our briefs. will all be dealing with the same set of numbered pages.

THE HEARING EXAMINER:-- That is a good suggestion; in fact, unless you can point out a reason why it should not be done, I will request it be done.

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MR. HOLLAND: I have no objection; there are methods of referring to the pages; for example, when you start getting through the latter portion of the transcript there is a designation in the upper lefthand corner, JBRR and a number; there are designations.

THE HEARING EXAMINER: This is a bad enough parcel as it is; I would suggest if that is the Exhibit that you are offering, that you mark it page by page on the lower part of the page in red, the page number in red.

(OFF RECORD DISCUSSION)

MR. HOLLAND: The total number of pages in Government Exhibit 3 for identification stands at 489.

THE HEARING EXAMINER: Do you agree with that, Mr. Fawer?

MR. FAWER: Yes. Again, I make one additional suggestion; that in some way that be bound with a clip so nothing is missing.

THE HEARING EXAMINER: It is numbered by page.

MR. FAWER: Yes, but it is going to remain with the Court Stenographer; all I am suggesting is you put something in to preserve it.

THE HEARING EXAMINER: Yes, I agree, that is a matter of mechanics.

MR. FAWER: I withdraw that.

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THE HEARING EXAMINER: That is a proper request; how you do it, I don't know. Are you ready to proceed? —

MR. HOLLAND: Yes, I would like to offer GX-3 for Identification in evidence.

MR. FAWER: No objection.

THE HEARING EXAMINER: Before I rule on it at this time, I am receiving this as the Government Exhibit without objection from Respondent's counsel, correct?

MR. FAWER: Yes, I join in the submission of the document.

THE HEARING EXAMINER: As I understand it, this is being submitted to prove counts two, three and four of the Complaint, correct Mr. Holland?

MR. HOLLAND: Correct.

THE HEARING EXAMINER: As I understand it further, it is the testimony as contained in this Exhibit, including the cross-examination of the Government witnesses in this case, and including the defense witnesses that were offered in this case, as all part of the evidence, correct?

MR. HOLLAND: That is correct, with a proviso, that Mr. Fawer and I agree that that entire transcript, which includes matters that are not testimony, are also before you.

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MR. FAWER: Correct.

THE HEARING EXAMINER: Clarify that further.

MR. HOLLAND: For example, Mr. Fawer indicated he would like to refer to the Judge's instructions to the Jury in this case; obviously, this is not evidence or testimony, as such.

THE HEARING EXAMINER: Yes, I understand. Now, as I understand further, does this record in any way contain the verdict? Was this a Jury case?

MR. FAWER: Yes.

THE HEARING EXAMINER: Does this record as Exhibit 3 being offered here contain the verdict of the Jury?

MR. HOLLAND: Yes, sir.

THE HEARING EXAMINER: Is that intended in any way as part of your evidence, Mr. Holland?

MR. HOLLAND: I would like to make reference to it, yes, sir; I am not going to argue that you are bound by any Jury determination.

THE HEARING EXAMINER: This is an initial case before me now; what evidence is being presented by this document to prove, as I understand you intend to do, the allegations contained in Count II, III and IV of the Complaint? _ _ _ _

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MR. HOLLAND: The pages of Government Exhibit 3 that would show the allegations in the Complaint are the testimony portions of this Exhibit; that would be pages 1 through, I believe, 352; however, there are legal issues here, arguments about Collateral Estoppel; that may, in fact probably will, require reference to other pages of Government Exhibit 3 other than the testimony that is--

THE HEARING EXAMINER: --In support of your case?

MR. HOLLAND: Equally in support of Mr. Fawer's case.

THE HEARING EXAMINER: At this time I again repeat I don't want any misunderstanding; you are offering this only in support of your charges contained in II, III, and IV of the Complaint, correct?

MR. HOLLAND: Additionally, I wish to be able to refer to other pages of the Complaint not strictly to show the allegations in counts II, III, and IV of the Complaint, but also to show that Collateral Estoppel does not lie here.

THE HEARING EXAMINER: You are getting into legal arguments. We are not talking about legal arguments at this time; as I understand our proceedings, you are purporting to prove the allegations of fact contained in II, III, and IV of the Complaint.

MR. HOLLAND: Correct.

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THE HEARING EXAMINER: Can you tell me what pages of this Exhibit you rely upon for that?

MR. HOLLAND: It is impossible to single out specific pages, I would say, because of the nature of this.

THE HEARING EXAMINER: As I understand, the Jury's verdict is a part of the Exhibit, correct?

MR. HOLLAND: Correct, your Honor.

THE HEARING EXAMINER: Is that a part of your proof that you are offering at this time?

MR. HOLLAND: That is a matter that I wish to be able to refer to.

THE HEARING EXAMINER: Right now, as I understand it, you are offering factual proof, correct?

MR. HOLLAND: Correct.

THE HEARING EXAMINER: Is the total document factual proof of the charges in II, III, and IV?

MR. HOLLAND: This is difficult to answer, your Honor. Not necessarily so.

THE HEARING EXAMINER: Tell me necessarily then.

MR. HOLLAND: The factual matters that are alleged in the Complaint of this proceeding are only the testimonies of the witnesses that I indicated.

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THE HEARING EXAMINER: You mean you are using the testimony of witnesses in the criminal case in your offer of proof for the factual allegations in the Complaint in II, III and IV. Correct?

MR. HOLLAND: Yes, sir, I am saying the witnesses as they testified in the criminal proceeding would so testify in this proceeding, that includes the cross-examination.

THE HEARING EXAMINER: Of the witnesses that you previously named?

MR. HOLLAND: Yes, I named two; Mr. Faver has his own witnesses.

THE HEARING EXAMINER: Just deal with your cause; it is the testimony of those two witnesses as contained in that exhibit that you are now offering? Correct?

MR. HOLLAND: Yes, sir.

THE HEARING EXAMINER: Is that correct?

MR. HOLLAND. Yes, sir.

THE HEARING EXAMINER: Do either of you have any further comments before I receive this document into evidence, as to its purpose as it is now being offered; I am receiving the total document, but you have indicated to me the purpose for which you are now offering. Do you have any comments?

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MR. FAWER: It is my reason for being a party to this offer of proff of Exhibit III; I think it is somewhat broader than Mr. Holland's; As your Honor pointed out, Mr. Holland is offering proof of three factual allegations; our defense, however, is a factual defense as well as a legal defense; so, just if I may point out, whereas the Jury's verdict, per se, does not have any part of his offer of proof, it very clearly is part of my evidentiary offer of proof in support of my legal position dealing with Collateral Estoppel.

THE HEARING EXAMINER: I am merely trying to get as much clarification on the record as is possible; in other words, I understand that this total document is now coming into the record; I am receiving it as a total; but as I made clear to you previously, to both of you, I am not going to have the burden of ferreting out of this document by guess work or otherwise what portions of it is intended to support either the charges or defense; This I am expecting, as I have previously stated, to be specifically pointed out to me in your briefs; that is why I am receiving the total Exhibit, so you can both use it, but I am really over emphasizing the fact that I will use that Exhibit meaningfully only by virtue of your specific references in your briefs; do I make myself clear? Is there any question? Please make yourselves known on the record.

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MR. HOLLAND: I have no comment.

MR. FAWER: No question

THE HEARING EXAMINER: I will receive this GX-3 into the Evidence.
(GOVERNMENT EXHIBIT NO. 3 RECEIVED IN EVIDENCE.)

MR. HOLLAND: I have a witness I would like to call at this time.

MR. FAWER: I would request a proffer of proof be made as to this witness.

MR. HOLLAND: This is an administrative proceeding.

THE HEARING EXAMINER: I don't see any reason for that; bring your witness in.

MR. FAWER: I requested the proffer simply as a means of expediting the matter, but it seems as far as I am aware, all facts relevant to the issues in this case were litigated at the earlier criminal trial; I know of no other witnesses who did not testify who had relevant information; I am saying there is nothing else that--

THE HEARING EXAMINER: --You are getting into your defense.

Mr. Holland, bring your witness in.

(MR. WILLIAM WINDWEAR ENTERS CONFERENCE ROOM.)

THE HEARING EXAMINER: I will swear the witness. State your full name for the record. Spell it for the Stenographer.

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WILLIAM WINDWEAR: William Windwear, W-I-N-D-W-E-A-R.

(WILLIAM WINDWEAR, called as a witness, having been first duly
SWORN BY THE HEARING EXAMINER, TESTIFIED AS FOLLOWS:)

EXAMINATION BY MR. HOLLAND:

Q Please state your full occupation and post of duty.

A Internal Revenue Agent, Manhattan District, New York, New York.

Q Did you audit the SUTTON & SUTTON corporate tax returns for the
period July 23, 1967 to August 31, 1967?

A I did.

Q Did you audit such corporation tax returns for the fiscal year
ending August 31, 1968?

A I did.

Q When was this Audit conducted?

A During 1972.

MR. FAWER: I move to strike his testimony; there is nothing in the
charges. The dates charged in the Complaint, the outer limits of
September 22, 1970, I make the allegation that it is part of the proof
in Exhibit 3, which is now in the record. MR. HARARY was arrested one
week later, on September 29, 1970; as with the SUTTONS, any events
subsequent thereto can have no bearing; I submit on the charges
contained in this Complaint, which by its terms ends on September 9,
1970 and not as now offered for proof concerning events two years hence.

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THE HEARING EXAMINER: Comment on that.

MR. HOLLAND: Your Honor, it is hard to deal with that matter; since you have not read the transcript, it will be necessary for me to refer to the transcript itself, subsequent to your reading later on; A position of Respondent's defense is that he was entrapped; I am separating that defense; one of the things he used to show that, in effect, is that this whole argument is useless, fraudulent; there was no basis for getting into these items and I maintain the subsequent argument will show that the initial Audit was a legitimate Audit and that the procedures that were used therein were correct; I realize you have difficulties dealing with this, in view of the way the proceeding is going.

THE HEARING EXAMINER: I understand, I will overrule the objection.

MR. FAWER: I except. May I make a statement? My exception is that this witness' testimony can have no bearing on the issues in this case while it is a false claim of entrapment; it is exclusively based on the conduct of Inspector Wenig and Agent Ostrow; that is the only matter which gives rise to our defense of entrapment; that which may or may not have occurred two years later can have no bearing on that defense of entrapment and events subsequent thereto can have no bearing.

THE HEARING EXAMINER: Aren't you repeating what you told me?

MR. FAWER: No. — — — —

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THE HEARING EXAMINER: Do you have any further comment, Mr. Holland?

MR. HOLLAND: No.

MR. FAWER: I would like to make a comment; there has never been a suggestion that there was any argument, nor was there any argument at the trial or allegation that that Audit was fraudulent as conducted by the Internal Revenue Service; Mr. Holland made that allegation; that has never been suggested.

MR. HOLLAND: I will withdraw the word fraudulent.

MR. FAWER: Neither did we ever take that position.

THE HEARING EXAMINER: I have overruled the objection; you have taken an exception. Proceed, Mr. Holland.

EXAMINATION BY MR. HOLLAND:

Q How were the SUTTON & SUTTON returns assigned to you?

A Through the Inspection Service from Agent Ostrow to me.

Q Why was that assignment made?

A When there is any problem arising with bribery, the case is taken away from the original Agent and given to another Agent.

BY THE HEARING EXAMINER:

Q When was this assigned to you?

A I just said I conducted the Audit in 1972.

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BY MR. HOLLAND:

Q In the course of auditing the SUTTON & SUTTON corporate returns did you also audit the individual tax returns of the shareholders of such corporation?

A I did.

Q Specifically, did you audit the individual income tax returns of MEYER and ABRAHAM?

A I did.

Q Why did you do that?

MR. FAWER: I object.

THE HEARING EXAMINER: Overruled.

A When we examine items on the corporation that appear to be relevant to the individuals and may cause additional taxes on the individuals, we automatically examine the related individuals.

BY MR. HOLLAND:

Q For what years did you audit ABRAHAM and MEYER SUTTON'S individual income tax returns?

A In 1967, 1968 and 1969.

Q At this time did you audit any other tax returns besides SUTTON & SUTTON and MEYER and ABRAHAM SUTTON'S individual tax returns?

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A Yes, sir. I examined, I think it is six, related corporations that the same individuals own.

Q What do you mean by related?

A The fact that the same three individuals own corporations and I was examining the individuals, I felt that the related corporations were relevant to my examination.

Q Tell who these related individuals are and the corporations are, for the record.

MR. FAWER: I object on the grounds of relevancy.

THE HEARING EXAMINER: I overrule your objection.

A ABRAHAM, MEYER and OBADIA SUTTON.

Q What else did you audit?

A On 14th Street.

Q Describe them generally.

A There are six retail corporations; I can't recall the exact names.

Q What kind of retail corporations were these?

A They sell general merchandise to the public.

Q Cash operations?

A Right. Cash sales corporations.

Q Are these six corporations in addition to the SUTTON & SUTTON?

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A Yes, sir, I examined them.

Q Can you explain to us what a related return is?

A Where the same stockholders own or control different entities, we examine them together, the same ownership of the different corporations.

Q What is it you examine? Do you examine their individual returns?

A I examined the individuals and from the individuals I examined the related corporate returns.

Q Do you have authority to assess evidence of those related returns?

A Yes, sir.

Q As a result of your audit in 1972, did you assess any additional tax with respect to SUTTON & SUTTON?

A I did.

Q Was that tax paid?

A Yes, sir.

Q As a result of your audit, did you assess any additional tax with respect to MEYER SUTTON'S individual return?

A Yes, sir.

Q For what year?

A 1967, 1968 and 1969.

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Q How much was the assessment for 1967 and 1968?

MR. FAWER: I object to that.

THE HEARING EXAMINER: Overruled. State your objection.

MR. FAWER: The best evidence of any deficiency is the document in which the deficiency appears, the document which is provided by the Internal Revenue Service; it is the official records of the Service which is the basis of the assessment; that is the best evidence.

THE HEARING EXAMINER: You are invoking the best evidence? I overrule your objection.

BY MR. HOLLAND:

Q Tell us, Mr. Windwear, how much the deficiency was with respect to MEYER SUTTON'S individual tax returns for 1967, approximately?

A May I check some notes?

Q Would it refresh your recollection to refer to those notes?

MR. FAWER: I object, your Honor; again, the best evidence is the document, not his recollection.

THE HEARING EXAMINER: I overrule your objection.

BY MR. HOLLAND:

Q Please refer to any notes.

A Yes, sir. \$19,000

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Q Were any penalties assessed to that return?

A Yes, sir.

MR. FAWER: I object.

THE HEARING EXAMINER: State your reason.

MR. FAWER: There is no relevancy to what the penalties imposed on MEYER SUTTON in 1967 on the income tax return has to do with the declarations lodged in Complaint 72-6.

THE HEARING EXAMINER: I overruled your objection.

BY MR. HOLLAND:

Q Please answer.

A A five percent negligence penalty was assessed.

Q How much?

A \$965.

Q Was such tax and penalty paid by MEYER SUTTON?

A Yes, sir.

Q As a result of your Audit, did you assess an additional tax with respect to MEYER SUTTON individually, for 1968?

A I did.

Q How much was your assessment?

A \$28,700.

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Q Were there penalties assessed for that ?

A Yes, a negligence penalty of \$1435.

Q Was the tax and penalty assessed for 1968 also paid by MEYER
SUTTON?

A Yes, sir.

Q As a result of your Audit, did you assess additional tax with
respect to ABRAHAM SUTTON'S individual income tax return?

A Yes, sir.

Q For the years?

A 1967; \$19,000.

Q 1968, how much?

A \$32,000.

Q Were any penalties assessed to those years?

A Yes, sir; negligence penalties; \$900 in '67 and \$1600 in
'68.

Q Were such penalties and assessment of tax paid by ABRAHAM SUTTON?

A Yes, sir.

Q You previously referred to the fact that you audited some discount
stores? Correct?

A Yes, sir.

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Q As a result of your Audit, did you assess any additional tax with respect to those discount stores?

A Yes, sir.

THE HEARING EXAMINER: I don't understand what you are talking about. I recall this witness referring to his Audit of related taxpayers resulting from the primary tax Audit, which was referred to as six corporations identified, as I recall, as retail outlets. Is this what you are talking about?

BY MR. HOLLAND:

Q As a result of your Audit in 1972, did you assess any additional tax with respect to the six retail outlets?

A Yes, sir.

Q Can you tell us what the additional tax was with respect to the six retail outlets for 1967 and 1968?

A I didn't examine 1967, I examined fiscal calendar year 1968.

Q How much was the deficiency for that year? You may refer to your notes if you don't remember specifically. Give us the total amount of deficiency for the six retail corporations that you mentioned.

A For 1968?

Q Yes.

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Q Mr. Windwear, was any part of the deficiency that was assessed against ABRAHAM and MEYER SUTTON with respect to an item of capitalization of \$199,000 appearing on the SUTTON & SUTTON income tax return?

A Yes, sir.

Q Tell us approximately how much of the deficiency, as assessed against them, resulted from that \$199,000 item?

A Offhand, I would say \$80,000.

Q I have no further questions.

THE HEARING EXAMINER: That was assessed against who?

MR. HOLLAND: MEYER and ABRAHAM SUTTON.

THE HEARING EXAMINER: If I understand, your question was as to whether or not there was a deficiency assessment growing out of the \$199,000 capitalization item appearing on the SUTTON & SUTTON income tax return. My question is, if I understand, who was the deficiency made against?

MR. WILLIAM WINDWEAR: You mentioned just two.

THE HEARING EXAMINER: I am just trying to understand the question and answer.

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BY MR. HOLLAND:

Q Will you tell us how much, if any, of the deficiency assessed against MEYER and ABRAHAM SUTTON related to the \$199,000 capitalization item appearing on the SUTTON & SUTTON corporate tax return?

A I would say approximately \$50,000.

THE HEARING EXAMINER: You just changed that.

MR. WILLIAM WINDWEAR: I misunderstood that.

THE HEARING EXAMINER: You are changing the \$60,000 to \$50,000.

MR. HOLLAND: I have no further questions.

(CROSS-EXAMINATION BY MR. FAWER)

BY MR. FAWER:

Q MR. WINDWEAR, when were you assigned this Audit?

A I personally was assigned the Audit at the beginning of 1972 around January or February.

Q Would you have a record of the assignment?

A We have the item in the office.

Q Were you assigned the case from Mr. Ostrow?

A The case was assigned to the Group from Mr. Ostrow and I was the first agent that was able to work on it because it had been-- I think the Defense Attorney had requested no action, so physically two other people had it and it was given to me to conduct the case; so, when I said "directly" I forgot it went through two hands until it got to me.

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Q When you said Defense Attorney, was that for the SUTTONS?

A Yes.

Q Were you aware of the fact when you began your investigation of your Audit that there had been a trial relating to Mr. Ostrow's involvement?

A Yes, sir.

Q Were you aware that there was a jury verdict acquitting MR. HARARY, who was the taxpayer's representative, of bribing Mr. Ostrow?

A I don't know the details, but--

THE HEARING REPORTER: His specific question was, "Were you aware of the fact that MR. HARARY had been charged with bribery and that he had been acquitted?"

A No.

BY MR. PAWER: That is close, not exactly.

Q By the way I took it, during the course of your Audit the SUTTONS' Representative was not MR. HARARY?

A Correct.

Q You indicated you heard something. I would like to inquire; what was the information you did have?

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A No. I knew about the bribery case but I didn't know specifically that MR. HARARY--you stated that MR. HARARY was acquitted; I didn't know that specifically.

Q What did you know about the bribery case?

A There was a case and the taxpayer was convicted; that is when I started the Audit, after the trial or the appeal was completed, then they told me I could start the examination.

Q I see. How did you calculate that the deficiency was \$199,000 of capitalization?

A I stated that it was unreported income of the Individual Stockholders.

Q Upon what do you base that?

A Upon no substantiation; it was not taxable.

Q What substantiation did they offer?

A Me? Nothing.

Q You had Ostrow's files?

A Mr. Ostrow's workpapers; I remember reading a statement that they had said it came from the mother and the sister, but there was nothing further.

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Q Not any information about it coming from Syria via Israel?

A I don't recall that, I don't recall seeing it.

Q Were there any letters relating to the \$199,000 in the workpapers?

A I never saw any letters from the taxpayer. I never saw any.

Q Are you aware of Mr. Ostrow testifying in trials of letters submitted to him in substantiation of the \$199,000?

A No.

Q There was nothing in the file which contained these letters?

A Not in the files I worked with.

Q You did not have a letter from Mr. Jack Nasser relating to the \$199,000?

A No.

Q Nothing in the file relating to the liquidation of the SUTTON'S estate in Syria? Nothing at all?

A Nothing at all.

Q Did you advise the SUTTONS that they had no substantiation of the \$199,000? Nothing in the files to substantiate it?

A I never spoke to the SUTTONS.

Q You just spoke to the Representative?

A Yes.

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Q Did you ask him about the substantiation?

A Yes, sir.

Q He gave you no additional substantiation?

A He gave me none.

Q As far as you know--I withdraw that. At this moment you have no knowledge as to what extent substantiation had been given to Mr. Ostrow on the same item?

A No.

Q But in any event whatever substantiation given to him was never considered by you in any way in assessing the deficiency?

A Right. I never saw it.

Q Did you ever bother to ask Mr. Ostrow if he was given any substantiation?

A No, sir.

Q Didn't you make any attempt to pick his audit up where Mr. Ostrow left off?

A Yes, sir.

Q How did you know what he had accomplished?

A From the worksheets given to me.

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Q Nothing on the worksheets indicated any substantiation?

A No, sir.

Q You never made any inquiry of Mr. Ostrow whether any documents were supplied in his substantiation?

A Right, I never did.

Q You just relied on the fact that if there was a document in substantiation it should have been in the file?

A Or another copy could have been given to me, right?

Q To your knowledge--I withdraw that. Do you have any knowledge that the substitute representative, I don't recall his name, the substitute representative for MR. HARARY, did not assume that you already had been supplied by Mr. Ostrow with information?

A I don't think he assumed it.

Q Did you open up avenues that had already been taken care of by Mr. Ostrow? There were phases of the audit that had been completed by Mr. Ostrow? Correct?

A I don't catch what you are driving at.

Q I will explain. There are various facets to an Audit, a number of items you normally wish to check; Mr. Ostrow, I believe, had been engaged in the Audit prior to September 22, on two full days.

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MR. HOLLAND: I object; he says two full days.

THE HEARING EXAMINER: Are you satisfied with what he said?

MR. HOLLAND: I withdraw that.

BY MR. FAWER:

Q Were there certain facets which Mr. Ostrow had completed and there was no need for you to re-do them?

A No, I don't think he had made any transcripts of accounts which I used again.

Q And did not make subsequent inquiry for?

A Right.

Q So, you did rely on the work he did?

A Right, to the extent that he did work on the \$199,000 item; there would have been no need to go back and request additional work as to that additional material; in other words, if there were determinations on the workpapers that I could rely on.

Q I don't want to confuse you. I assume you made the tax representative know what areas you were interested in? There were certain areas that Mr. Ostrow had already dealt with, one was the \$199,000?

A Right. _____

Q On what do you base your statement that the new taxpayer's representative did not know that that documentation had already been supplied?

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A I don't remember stating that.

Q You have no knowledge that he was not operating on the assumption that you already had in your possession--

MR. HOLLAND: Objection.

BY MR. FAWER:

Q You have no knowledge, do you, that he was not operating on the assumption that you already had in your possession substantiation or whatever substantiation of the \$199,000?

MR. HOLLAND: I object.

THE HEARING EXAMINER: Can you answer that question?

A I have no knowledge.

THE HEARING EXAMINER: Do you have any objection to that, Mr. Holland?

MR. HOLLAND: No.

MR. FAWER: I have no further questions.

BY MR. HOLLAND:

Q I have a couple of questions. Did you ask the taxpayer's representative to supply all substantiation he had for the \$199,000 item?

A Yes, sir.

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Q Who was the taxpayer's representative?

A There were three.

Q Who were they?

A One, the original attorney, B-U-R-S-T-E-I-N.

Q The original attorney on what?

A The bribery case representing the SUTTONS.

Q Who were the other two?

A B-O-R-I-S K-O-S-T-E-L-A-N-T-E-Z and IRVING D-U-C-H-A-N.

Q Are you familiar with these latter two gentlemen? Have you had experience with them before this Audit?

A No, I had never met them.

Q Were you aware of them by reputation?

BY MR. FAWER: Objection.

THE HEARING EXAMINER: I have some question as to relevancy; what is your response, Mr. Holland?

MR. HOLLAND: I withdraw the question.

BY MR. HOLLAND:

Q Did you give the taxpayer's representatives an opportunity to supply any material at all that they might have in substantiation of the \$199,000 item?

A I did.

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Q Did they come forth with any substantiation?

A No, sir.

Q I have no further questions.

THE HEARING EXAMINER: Thank you.

MR. HOLLAND: The Director of Practice has no further evidence to present at this time.

(FIVE MINUTE BREAK IN THE PROCEEDINGS)

THE HEARING EXAMINER: We are now back on record. As I understand, the Government rests, correct?

MR. HOLLAND: Correct.

MR. FAVER: I would renew the motion to dismiss, filed prior to the hearing today and I would renew each of the grounds contained in that motion to dismiss; in addition, as part of our case I would offer in Evidence the Indictment in United States Vs. HARARY, Indictment Number 70 Cr. 1104 and have that marked EX-1 for identification.

THE HEARING EXAMINER: Mr. Faver, I want us to be clear now; if I understand you, you are renewing your motion to dismiss immediately; you want me to dismiss this proceeding now. Correct?

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MR. FAWER: I make that motion before going forward with proof.

THE HEARING EXAMINER: I will see when you file your brief what your basis is, at that time after the hearing, for dismissing the charges; now, as I understand your motion, that you filed your written motion with me, I forget the dates; I denied that written motion; now, as I understand, at the proceedings that we are in, you are now making that motion; you are renewing a motion to dismiss, which I understand to mean now.

MR. FAWER: I will amend, your Honor, to first make my offer of proof, then to complete the proof, then I will move to dismiss.

THE HEARING EXAMINER: Let me be clear; you don't have to make a motion in that respect; for instance, at the end of the hearing, or after you submitted your briefs, that is a part of your argument to dismiss the charges; do you agree with that, Mr. Holland?

MR. HOLLAND: I don't; you denied his motion once; I don't see why it has to be done again.

THE HEARING EXAMINER: I will overrule you; when I denied the motion to dismiss the charges at that time, that did not foreclose you from arguing anything that may have been in that motion to dismiss these charges after this hearing.

MR. FAWER: Thank you, your Honor, that is absolutely clear.

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THE HEARING EXAMINER: MR. HOLLAND, do you agree?

MR. HOLLAND: Since you overruled me.

THE HEARING EXAMINER: What are your objections? I can't understand your objections. Your position is, he is foreclosed from raising those questions in any respect hereafter.

MR. HOLLAND: I would argue, yes.

THE HEARING EXAMINER: I will overrule you, you can rest assured, that is firm; you should be prepared to answer to the extent he may raise those questions again.

MR. HOLLAND: I understand.

MR. FAWER: Your Honor, I will offer RX-1, the Indictment in 70 Cr. 1104.

MR. HOLLAND: No objection.

THE HEARING EXAMINER: Received.

(OFF RECORD DISCUSSION)

MR. FAWER: I would then offer in evidence as RX-2 the decision of United States Court of Appeals for the Second Circuit, rendered on February 28, 1972 in the case of United States of America Vs. CHARLES HARARY.

THE HEARING EXAMINER: That is what case?

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MR. FAWER: The appeal from the trial of Indictment No. 70 Cr. 1104, GX-3, which trial resulted in an acquittal of Counts I and II of the Indictment and Conviction on Count III; the Appeal was of that conviction on Count III.

THE HEARING EXAMINER: The Indictment was offered and received without objection; I am going to ask you what the purpose of your offering these two Exhibits is?

MR. FAWER: Both the Indictment and the Court of Appeals' determination are relevant to Number I of our defense in this case, Legal Defense, I, of which is the Collateral Estoppel Defense; the fact that was made a motion to dismiss does not indicate, as your Honor indicated, detract from that being our defense at this point in time; it is important for your Honor in determining the propriety of our raising the Collateral Estoppel Defense in this case; it is necessary for you to analyze that which was decided at the earlier proceeding; this can only be done in light of the Indictment, which is RX-1 in Evidence, the testimony and entire proceeding at the trial, which is GX-3 and finally, in the light of the Court of Appeals' determination, which I offer as RX-2.

THE HEARING EXAMINER: Any objection?

MR. HOLLAND: I will object to this last Exhibit on the basis that case is a reported case; Respondent can make references to the case rather than the brief, which I don't have.

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THE HEARING EXAMINER: I am sure he is doing that for my convenience.

MR. HOLLAND: It is equally convenient to refer to Vo. 457.

THE HEARING EXAMINER: In the light of MR. HOLLAND'S objection, it being very technical, I suggest if you want to use that case as reported, which I assume you do, that you merely refer to that case by proper citation. Is that possible?

MR. FAWER: It is, your Honor; I would still offer, even if done only by designation, that part of the record in the case be the determination as reported by the Court of Appeals; my offer would then be that the decision in United States Vs. HARARY, Vol. 457 f2D 471 (Second Circuit 1972) be made a part of the record in this case.

THE HEARING EXAMINER: Any objection, Mr. Holland?

MR. HOLLAND: No objection.

THE HEARING EXAMINER: That obviously is received, based on your premise; I am also going to ask what you submitted as GX, that would be RX-2, would it not?

MR. FAWER: Yes, sir.

THE HEARING EXAMINER: RX-2 is your reference to the reported decision, as well as the copy thereof, which you have submitted for my convenience. Any objection, Mr. Holland?

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MR. HOLLAND: No.

THE HEARING EXAMINER: Received. I meant to say I am receiving your Exhibits, Mr. Fawer; that is RX-1 and RX-2, and particularly, RX-2, under the same conditions that GX-3 was received; namely, that you, in your briefs which I will request you to file in this case, will specifically refer in the indictment, as well as in the decision, to those portions thereof upon which you were relying for your defenses. Is there any question on that?

MR. FAWER: No problem, your Honor, except I must say it seems to me it is absolutely mandatory that your Honor read that decision of the Court of Appeals, although, of course, I will allude to the specific portions which I suggest are in particular support of my particular position.

THE HEARING EXAMINER: Mr. Fawer, I have never seen the testimony that has been offered in the case in GX-3; I have never seen this decision; I don't know whether it is a ten page decision, or one thousand page decision; what I am saying here is that I want to make clear that you point out to me, as well as Mr. Holland, the specific portions of those Exhibits which you have both introduced that are relevant to your case so that I will not be guessing as to what you may be relying upon for either your prosecution or defense; this is what I am trying to make clear.

Complaint No. 72-6

MR. FAWER: Do I understand, your Honor that until now your Honor has not read the Court of Appeals decision?

THE HEARING EXAMINER: I have not read anything in this case other than--I will put it in the positive--the only thing I read in this case is the Pleadings; namely, the Complaint and the Answer, your motion, as well as your brief supporting your motion in support of your motion and Mr. Holland's Response to your motion; this is what I have read in this case.

MR. FAWER: I have no material to offer; I do rely, obviously, I join in the offer of GX-3.

THE HEARING EXAMINER: I think it is appropriate that you say this.

MR. FAWER: That GX-3, that is a transcript of the entire trial; that I agree that the testimony adduced at that trial is the same as would be the testimony had we called the witnesses to testify in this proceeding.

THE HEARING EXAMINER: As I understand it, you intend, which I understand you agree to, MR. HOLLAND, to use that transcript in your defense?

MR. FAWER: Exactly.

THE HEARING EXAMINER: - Right, Mr. Holland?

MR. HOLLAND: Right.

A 356

Complaint No. 72-6

MR. FAWER: MR. HARARY rests his case on those documents.

THE HEARING EXAMINER: Mr. Holland?

MR. HOLLAND: No further questions.

THE HEARING EXAMINER: Both sides have completed the presentation of their cases. Correct?

MR. HOLLAND: Correct.

MR. FAWER: Correct.

(OFF RECORD DISCUSSION)

THE HEARING EXAMINER: After discussion off-record, it has been agreed between counsel, at my request, that proposed findings and conclusions and supporting briefs with specific references to the record in this case and to any part of the record relied upon for either prosecution or defense, that these documents will be released simultaneously by counsel on December 31, 1973 with the original and one copy to me and copies exchanged between counsel and that on January 31, 1974 reply briefs will be simultaneously sent to me and exchanged between you. Are there any questions, please, on the record?

MR. HOLLAND: Nothing.

MR. FAWER: Nothing.

THE HEARING EXAMINER: This hearing is adjourned.

(RECORD CLOSED, 2:10 P.M.)

I, BETTY E. MINA, Reporting Stenographer, do hereby certify that I took the record of the foregoing proceeding in Stenotype and personally transcribed it from my Stenotype notes.

Betty E. Mina
Reporting Stenographer

AFTERNOON SESSION

(2.15 p.m.)

LAWRENCE O S T R O W , resumed.

REDIRECT EXAMINATION

BY MR. PHILLIPS:

Q Agent Ostrow, how many audit examinations have you conducted since you have been with the Internal Revenue Service?

A Over two hundred.

Q Was this audit examination of the Sutton corporate returns conducted in any different way than the other two hundred audit examinations that you conducted?

A No; it was not.

Q You testified on cross-examination that the ways in which an audit examination is initiated is, one way through an informant's communication referred to Intelligence; the second way from internal information received from other agents conducting other audits, and the third way was through National Office rulings in Washington, D.C. Are there other ways?

A Yes; there are.

Q What are other ways?

A There's the way this examination was initiated, by referral -- by request to the Audit Division from the

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Inspection Division.

There's also referral reports that come in to the Audit Division from the Collection Division. And there are some others. I can't think of all of them right at this time.

Q You testified also that the \$199,000 capitalization would have no effect on the tax of the corporation. Why, then, did you require substantiation of those items?

A Because during my corporate audit I am responsible for going into the matters of the people who own the corporation -- the Suttons in this instance -- and therefore I was obligated to look at their returns and make any appropriate -- take any appropriate action that was warranted.

Q Is this part of your assignment when auditing corporate returns: to also look at the returns of the officers of the corporation?

A Yes; it is.

Q Were the letters that you were shown alone sufficient substantiation?

A No, they were not. They just told the story, like anybody could have written it.

Q Incidentally, do you have those letters, or what did you do with those letters?

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2 A I was shown the letters by Mr. Harary in the
3 taxpayers' presence, and I left them there in the room
4 when I left.

5 Q After September 22nd, was this audit examination
6 reassigned to another revenue agent?

7 A Yes; it was.

8 Q Did you have any contact with it after that?

9 A No; I did not.

10 Q And is this normal where a bribe is offered?

11 A To my knowledge, it is.

12 Q What time did Mr. Harary tell you to be there
13 on September 22nd?

14 A At ten o'clock.

15 Q Did he tell you that on the phone?

16 A Yes, he did. The day that I was at Inspection,
17 to give my affidavit, and the inspectors stated that I
18 would have to cancel the appointment because they have to
19 get permission -- as they stated, they have to get
20 permission to have me wired for sound, and they would
21 have to go to the Attorney General of the United States,
22 and that would take some time, and they advised me to
23 cancel my Friday appointment, because that wasn't enough
24 time.

25 I called Mr. Harary to cancel my appointment,

1 mps

2 and that conversation was recorded, and it was during that
3 conversation he stated ten o'clock.

4 Q Did Mr. Harary ever indicate to you that he had
5 gone through the conference and appellate procedure?

6 A Yes. During our discussions at one of the two
7 meetings, either on the 1st or the 22nd, he had stated
8 that he had been to conference recently, and -- I'm not
9 sure -- I believe he mentioned appellate also, that he had
10 had matters with appellate.

11 Q He said he was familiar with that?

12 A Yes.

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pm 1 jbg 1

2 Q How many times did you tell the taxpayers and
3 Mr. Harary that they could go through this procedure if
4 they were not satisfied with your report?

5 A I believe at least twice. I mentioned to the tax-
6 payers that if they didn't agree with any of the adjustments
7 that I would make, they had their right to conference;
8 from conference they could go to appellate and from there
9 they can go to the tax court.

10 Q You say you told them at least two times?

11 A Yes.

12 Q When you returned on September 22nd, had you made
13 any decision as to whether the individuals should be taxed?

14 A No, I had not.

15 Q As of lunch time on September 22nd, was this still
16 an open question?

17 A Yes, it was.

18 Q What do you mean by an open question?

19 MR. FAWER: Excuse me. I thought that was his
20 phrase, not his phrase. I object.

21 THE COURT: Well, an open question was used through-
22 out your cross-examination, Mr. Fawer, in this area.

23 MR. FAWER: Then I withdraw it. I do not recall
24 using it that way but I am perfectly willing.

25 THE COURT: All right.

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A 362
Ostrow-redirect

jbg 2

A The taxpayers stated that they would get further substantiation for the item and I agreed that I would wait to accept the substantiation. There was no decision made. They would get whatever they could to show me that the item was proper.

Q Was this also true, that is, was the matter still open, when Mr. Harary made the initial bribe offer to you on the afternoon of September 22nd, after returning from lunch?

A Yes, it was.

Q Did you at any time during the audit examination suspect fraud?

A No, I did not.

Q Showing you Defendant's Exhibit A in evidence, these are your work papers, I believe you testified on cross-examination?

A Yes, they are.

Q Are those usual work papers that you make out during the course of an audit examination?

A No, they are not.

Q Why are they not?

A There are not very many here. I did get into some items but the majority of my time during the examination was spent discussing items with the taxpayers and on the morning

1 jbg 3

2 of the 22nd, most of the morning was spent discussing that
3 one item and therefore I didn't proceed with the work as
4 I normally would. -

5 Q You testified on cross-examination that you did
6 not say to Mr. Harary, "You can't offer me a prostitute, I
7 am a Revenue Agent."

8 Do you have instructions as to how you can respond
9 to such an offer, the offer that he made of a prostitute?

10 A Yes, I do.

11 Q What?

12 A The instructions from the --

13 THE COURT: You mean special just for prostitutes,
14 I understand?

15 Go ahead.

16 A The instructions from the Inspection Division are
17 that when a taxpayer attempts to offer you something or makes
18 a bribe to you, that you should not take the item at that
19 time but put it in sort of abeyance and report the item so
20 that the matter can be pursued to see if the taxpayer in fact
21 will offer you a bribe.

22 Q On September 22nd, in the morning, how long were
23 you there?

24 A Approximately two hours to two and a half, I be-
25 lieve, or three hours.

H 364

Ostrow-redirect

jbg 4

Q Was the recording device on the entire time?

A The entire time of the morning, yes .

Q During the course of that morning, did you say to Mr. Sutton, Meyer Sutton -- page 55, toward the bottom--

"Yes, then, it puts me out on a limb to say that it is good," and did Mr. Sutton say to you, "Well, but many times you-- that's up to you and your conscience to put it that way"?

A I don't remember the exact point but I did state that it did put me out on a limb when the taxpayer asks me to lie about an item or not to-- just to forget it, that it wasn't proper and by doing it, and the times Mr. Sutton did say items like this, I would be out on a limb.

Q During that morning, did Mr. Harary say to you -- page 49 -- "Let's close this now and put down that you saw it; come on, let's go to lunch and finish it"?

A Yes, he did tell me to forget the item, to accept it and to leave it as it was.

Q Did Mr. Harary tell you during the course of that morning to lie on your report?

A Yes, he did.

Q What was that in response to; do you recall?

A When I mentioned to the taxpayers, I believe, that they would be possibly taxed the monies, this \$199,000 would

jbg 5

Ostrow-redirect

1 apply to the three returns, at that point I believe Mr.
2 Harary stated, "Don't do it, lie about the item," and Mr.
3 Sutton said, "Don't mention that."
4

5 Q Do you recall Mr. Harary's exact words?

6 A No, I don't recall the exact words.

7 Q I show you Government Exhibit 3504 for identi-
8 fication, page 49.

9 Does that refresh your recollection as to Mr.
10 Harary's exact words and what you said to him?

11 A Yes. He-- I stated to Mr. Harary "that to say
12 something was good would be a lie, that it wasn't a story"
13 and he stated "to even lie."

14 MR. FAWER: Where are we?

15 Q That is on page 49, is it?

16 A Yes, page 49.

17 Q At lunch time, Agent Ostrow, you testified on
18 cross-examination that you were discussing with Meyer Sutton
19 and Mr. Harary the Intelligence Division.

20 What were you discussing at that time; do you re-
21 call?

22 A Yes. I believe it was either Mr. Sutton or Mr.
23 Harary who brought up the matter of individuals who didn't
24 pay their taxes to protest the current situation of the war
25 and economics, and at that time they were asking me what

A 366
Ostrow-redirect

1 jbg 6

2 was the government doing and I was just explaining the
3 various ways that Special Agents, there is an area for them
4 where the taxpayer does not file a return and that, where
5 the discussion centered around Special Agents from that
6 topic.

7 Q Do you recall after lunch Mr. Harary saying to
8 you, "I am just talking about" -- then inaudible-- "the
9 amount" --

10 MR. FAWER: Could we fix the time, your Honor?
11 When you say after lunch, when after lunch?

12 THE COURT: In the cross-examination by Mr. Fawer,
13 we were getting an idea of the pages or the number of
14 exchanges that took place so do you mean immediately they
15 came back after Mr. Ostrow went to the men's room?

16 MR. PHILLIPS: No.

17 Q This would be subsequent to the initial offer by
18 Mr. Harary and before you had agreed on an amount.

19 Do you recall Mr. Harary saying, "I am just talk-
20 ing about" -- inaudible -- "the amount"?

21 A I believe that was after the offer.

22 Q When he mentioned the word "amount" what was he
23 referring to then?

24 A He was talking about the amount of money that he
25 would pay me to do what he wanted me to do.

1 jbg 7

2 Q How many times did you say to him, "What do you
3 want me to do"?

4 A At least three; there possibly may have been an-
5 other one in the afternoon conversation but at least three
6 during this one conversation.

7 Q This was after lunch, is that correct?

8 A Yes, it was.

9 Q And what did you say that in response to? What
10 had he said preceding that?

11 MR. FAWER: On each occasion, your Honor?

12 Q On each occasion.

13 A I remember the first occasion, Mr. Harary stated,
14 "Maybe we can compensate you," he said in a low voice, and
15 at that time I responded, "What do you want me to do,"
16 which was the time that he may not have heard what I said
17 or I may have interrupted a thought of his and continued
18 talking about the various items of substantiation.

19 The next time I stated that, Mr. Harary said, "May-
20 be we can compensate you with women or some money" and at
21 that point I stated, "What do you want me to do," and he
22 again, he of course responded with "accept the item" and
23 told me exactly what-- not exactly but what he wanted me to
24 do to forget this item and then the third time that I re-
25 call was just during the point of fixing the price, when

1 jbg 8

2 the price was going up from 250 to 500 to 750. At one point
3 I just said, "What do you want me to do," just to try and
4 increase his price.

5 Q Now, Agent Ostrow, did you say to Mr. Harary that
6 he had made the initial offer?

7 A Yes, I did. I believe I said it a few times to
8 him.

9 Q Do you recall the exact words that you used?

10 A No, I don't recall the exact words.

11 Q I show you Government Exhibit 3504B for identi-
12 fication, page 3, approximately eight lines from the bottom.

13 Does that refresh your recollection as to the ex-
14 act words that you used?

15 A I stated to Mr. Harary that "How am I going to
16 say anything; you are the one that is making the offer."

17 Q Did he deny that he was making the offer?

18 A No, he did not.

19 Q While Mr. Sutton was gone to get the money did you
20 say to Mr. Harary that if he wanted to he could back out and
21 not go through with the bribe?

22 A Yes, I did, towards the end of the afternoon. I
23 stated to Mr. Harary that, I don't know the exact words, in
24 essence, "If you don't want to go through with it, then
25 we won't."

1 jbg 9

2 Q While you and Mr. Harary were waiting for Mr. Sutton
3 to get the money, did Mr. Harary mention anything about
4 the prostitute or the camera that he had previously offered
5 you?

6 A During our discussion in the afternoon, I men-
7 tioned to Mr. Harary, I asked "What had you done with the
8 camera," because previously on the September 1st meeting,
9 he had stated when I didn't take it, that he may not give
10 it back to the taxpayers, he may just drop it off at one of
11 his client's offices in the area because we were outside, that
12 he stated he may drop it off at one of his client's stores
13 and pick it up as he left the taxpayer's premises, so I
14 questioned him, "What did you do with the camera?"

15 Also during our conversations, I asked him why
16 he had offered me the prostitute and the camera; this was
17 after the bribe, and he stated "To see if I was approach-
18 able."

19 Q What did he say to you? Do you recall?

20 A I don't recall the exact words but to see if --
21 they could approach me, just to -- regarding a bribe.

22 Q Who first mentioned the prostitute?

23 A Mr. Harary.

24 Q Who first mentioned the camera?

25 A Mr. Harary.

A 370

jbg 10

Ostrow-redirect /recross

Q And who first --

MR. FAWER: Which day are we on now, your Honor?

THE COURT: I-assume it is the 22nd.

Q I am talking about any time. Who was the first one that mentioned the prostitute?

A Mr. Harary.

Q Of you or Mr. Sutton or either of the Suttons or Mr. Harary, who was the first to mention the camera?

A Mr. Harary.

Q And as to you, the Suttons or Mr. Harary, who was the first one that mentioned money or compensation?

A Mr. Harary.

MR. PHILLIPS: I have no further questions.

MR. FAWER: Just one or two, your Honor.

RECROSS-EXAMINATION

BY MR. FAWER:

Q Who was the first one to mention "That puts me out on a limb"?

A I was.

Q Just one further question, Mr. Ostrow.

There has been reference to prior proceedings. That testimony under oath was on May 17th and 18th of this year, was it not?

MR. PHILLIPS: Objection as irrelevant, your Honor.

1 jbg 11

2 THE COURT: Sustained.

3 MR. FAWER: May I approach the bench, your Honor?

4 THE COURT: What is the point? He was under oath.

5 MR. FAWER: All I want to do is fix how long ago
6 it was.

7 THE COURT: I don't think it makes any difference.

8 MR. FAWER: I think it does in terms of the recol-
9 lection and credibility of the witness.

10 THE COURT: Overruled.

11 I think the witness has explained it.

12 Objection sustained.

13 MR. FAWER: No further questions.

14 MR. PHILLIPS: I have no questions.

15 (Witness excused.)
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12 REDIRECT EXAMINATION

13 BY MR. PHILLIPS:

14 Q : Inspector Wenig, is the auditing of tax returns
15 done by the IRS, the Internal Revenue Service, in an
16 indiscriminate way or is it done only pursuant to inform-
17 ation received by the IRS and by careful selection?

18 MR. FAWER: I object, your Honor.

19 THE COURT: Overruled.

20 A Yes. It is selected in a careful manner, just
21 as you stated.

22 Q That is, pursuant to information received, and
23 then a selection system; is that correct?

24 A That is correct, sir.

25 Q Inspector Wenig, is it normal routine for

Inspection Service to refer cases to the Audit Division?

A Very normal and very routine.

Q How many audits have you personally, or how many cases have you personally referred to the Audit Division?

A Over a period of five years, I would say approximately forty to fifty returns.

Q How many over the past year has Inspection Service referred to the Audit Division?

A I would imagine it would go into the hundreds.

Q Why did you specifically request that Agent Ostrow be assigned to this particular audit?

A I knew his reputation within the Inspection Service. I had spoken to inspectors that he had worked with. I had seen him perform on other audits, and I knew that he was a reliable, honest agent and would do a proper audit.

MR. PHILLIPS: I have no further questions.

MR. FAWER: I have one or two, if I may.

RECROSS EXAMINATION

BY MR. FAWER:

Q By the way, this careful selection system you referred to when audits are conducted: that is part of Classification, isn't it?

ps4

Wenig-recross

1 ps4
2 Maybe you don't understand my question. The
3 normal way in which a tax return gets to be audited is
4 part of the classification procedure?

5 A I'm not too familiar with the classification
6 procedure per se.

7 Q Well, is it fair to say, then, Inspector Wenig,
8 as part of the Internal Revenue Service, basically most
9 returns which are audited are audited because of the
10 financial factors appearing on the return or the financial
11 factors of the entity filing the return?

12 A Well, I imagine it would have something to do
13 with the programming. There may be a program where a
14 search --

15 Q Where there are financial factors?

16 A There may be certain returns that they want
17 to audit at a certain time.

18 Q Based on financial factors; am I correct?

19 A Yes. I would say so.

20 Q Now, with regard to the cases that you referred
21 over to Audit, are you telling us that these hundreds of
22 cases, or whatever the figure was that you mentioned, are
23 cases in which the only information you have is that
24 if an audit were conducted there might possibly be a pay-
25 off overture in the future?

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1 ps5
2 MR. PHILLIPS: Objection. That is not what he
3 stated, your Honor.

4 MR. FAWER: I am asking him.

5 THE COURT: Rephrase that question.

6 Q You have testified that in this case you
7 initiated an audit and that the information that you had
8 at that point in time was that if an audit were conducted
9 you believed there might possibly be an overture?

10 MR. PHILLIPS: Objection.

11 THE COURT: Overruled.

12 A That was one of the factors.

13 Q The only other thing you knew was the cash
14 business?

15 A And the cash business.

16 Q Now, what I am asking you: Are you telling us
17 that you had referred over to Audit a hundred or whatever
18 the number was of other cases where the only allegation
19 is what might happen in the future if an audit were
20 conducted?

21 MR. PHILLIPS: Objection.

22 THE COURT: Sustained.

23 Q Was the information of Moore --

24 MR. FAWER: I withdraw that.

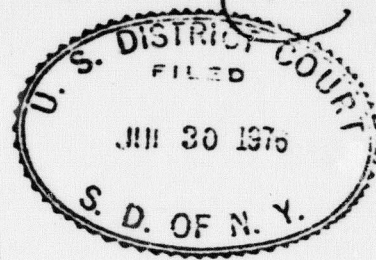
25 Q Was your information in the other cases where you

1
2 had definitive information of payoffs to Federal officials,
3 either of the Internal Revenue Service or other people?

4 A Possibly. -

5 MR. FAWER: No further questions.

A 377



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
CHARLES R. HARARY

Plaintiff

:

74 Civil 5712 (TPG)

-against-

WILLIAM E. SIMON, Secretary of the
Treasury of the United States of
America

:

JUDGMENT

:

Defendant

----- X

Plaintiff and defendant having moved the Court for summary judgment, pursuant to Rule 56, of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable Thomas P. Griesa, United States District Judge, and the Court thereafter on July 28, 1976, having handed down its opinion denying plaintiff's motion and granting defendant's motion, and directing the Clerk to enter judgment dismissing the complaint, it is,

ORDERED, ADJUDGED and DECREED: That defendant WILLIAM E. SIMON, Secretary of the Treasury of the United States of America have judgment against plaintiff CHARLES R. HARARY dismissing the complaint.

/ Dated: New York, N.Y.
July 30, 1976

Raymond F. Berghardt
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES R. HARARY,

Plaintiff,

versus

WILLIAM E. SIMON, SECRETARY OF
THE TREASURY OF THE UNITED
STATES OF AMERICA,

Defendant.

74 Civ. 5712

NOTICE OF APPEAL

Notice is hereby given that Charles R. Harary, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment dismissing the complaint in this action entered on the 28th day of July, 1976.

Dated: September 21, 1976

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DESIGNEE FOR SERVICE OF PROCESS
PURSUANT TO GENERAL RULE 4(a).

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